Appendix

SANTA BARBARA COUNTY WATER AGENCY ACT.

(Calif. Stats. 1945, c. 1501, p. 2780, as amended by Calif. Stats. 1949, c. 92, p. 18, 1 Deering's California Water Code Ann. Act 7303, West Calif. Water Code App. § 51).

SEC. 6.2

(1) All payments to the United States under any contract between the agency and the United States, including payments of interest and principal on bonds deposited with or transferred to the United States, shall be paid so far as possible from revenue other than that derived from agency taxes, unless otherwise provided by the contract or this act, and the balance, if any, of such payments shall be paid from revenue derived from annual taxes upon all taxable property within the agency assessable for agency purposes under the laws of the State, and the taxable property shall be and remain liable to be assessed and levied upon for the payments.

(2) Public land of the United States within the agency shall be subject to assessment and tax for all purposes of contracts with the United States to the extent provided for by the Act of Congress approved August 11, 1916 entitled "An act to promote reclamation of arid lands," or any other law which may hereafter be enacted by Congress in the same relation, upon full compliance therewith by the agency.

(3) All money collected in pursuance of the contract with the United States shall be paid into the

county treasury to the credit of the agency and held in a fund to be known as the "United States Contract Fund" to be used for payments due to the United States under the contract.

SEC. 10.1

If from any cause, the revenues of the agency shall be, or in the judgment of the board of directors are likely to be, inadequate to pay the expenses, costs, liabilities and indebtedness of the agency, the board of directors of the agency shall have the power in any year to levy an ad valorem tax upon all taxable property in the agency to pay the costs and expenses of said agency and to carry out any of the objects, purposes or powers of this act; provided, however, that the aggregate taxes or assessments levied under this act for any one fiscal year shall not exceed fifteen cents ($0.15) on each one hundred dollars ($100) of the assessed valuation of the taxable property in the agency exclusive of any tax levied to meet the bonded indebtedness of the agency and the interest thereon duly authorized by a vote of the electors of the agency, and exclusive of any special assessment levied to meet any indebtedness or contractual liability duly authorized by vote of the electors of the agency, and exclusive of any tax levied for the payment of any portion of any indebtedness represented by capital obligations underwritten by member units or represented by the amounts agreed to be paid by member units for any water or water supply to be furnished or sold such member units.

Said taxes shall be levied and collected together with, and not separately from, taxes for county purposes, and the revenue derived from said taxes shall be paid into the county treasury to the credit of the agency, and the board of directors shall have the power to control and order the expenditure thereof for said purposes.

confirmation" of the contract. (Ivanhoe: Clerk's Tr., Vol. 1, 50; Madera: Clerk's Tr., Vol. 1, 52; Santa Barbara: Clerk's Tr., Vol. 1, 113.)*

Presumably purporting to comply with Rule 15, 1(h) of the Rules of this Court, appellants have included in the appendices to the jurisdictional statement (herein cited as "app.") the opinions of the trial courts in the four cases, but have not included the findings of fact and conclusions of law entered by those courts. For such findings and conclusions, see Ivanhoe: Clerk's Tr., Vol. 2, 237-315; Madera: Clerk's Tr., Vol. 2, 422-541; Albonico: Clerk's Tr., 22-31; Santa Barbara: Clerk's Tr., Vol. 3, 681-705.

Under California law, it is the findings of fact and conclusions of law which control, not the trial court's opinion. See *Richter v. Walker*, 36 C.2d 634, 642; *Strudthoff v. Yates*, 28 C.2d 602, 615-616; *Stone v. L. A. County Flood Control Dist.*, 81 C.A.2d 902, 907. It will be noted that in each case the judgment entered by the trial court recites that it is based upon the court's findings of fact and conclusions of law and makes no reference to the court's prior opinion (app., 136-137, 158, 203, 227-228).

ARGUMENT

I. The Contracts Were Held Invalid Under California Law. The Judgment, in Each Case, Rests on an Adequate Non-Federal Basis and No Substantial Federal Question Is Presented.

Chief Justice Stone has stated the principle which, we submit, controls the instant cases, as follows:

> "* * * we have repeatedly held that where the judgment of a state court rests in part on a non-federal ground adequate to support it, this Court will not consider the correctness of the decision which the state

*The wording of this provision of the Santa Barbara contract varies slightly from the corresponding provisions of the Ivanhoe and Madera contracts, from which the above quotation is taken, but the sense is the same.

court also made of a federal question otherwise reviewable here." *Flournoy v. Wiener*, 321 U.S. 253, 262.

The reason for this rule

> "is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." Mr. Justice Jackson, speaking for the Court in *Herb v. Pitcairn*, 324 U.S. 117, 125-126.*

The foregoing quotations summarize the holdings in these two cases, which are in accord with numerous other cases applying the same rule. *Murdock v. City of Memphis*, 20 Wall. 590, 636, 638; *Berea College v. Kentucky*, 211 U.S. 45, 53; *Enterprise Irrigation Dist. v. Canal Co.*, 243 U.S. 157, 163-164; *Lynch v. New York*, 293 U.S. 52, 54-55; *Fox Film Corp. v. Muller*, 296 U.S. 207; *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120; *Black v. Cutter Laboratories*, 351 U.S. 292.

In strict conformity with the foregoing authorities, the Court has held that "drawn in question" means brought forward and made the ground of decision. *Champion Lum-*

*Of the present members of the Court, Mr. Justice Frankfurter dissented in *Flournoy v. Wiener* and Mr. Justice Black and Mr. Justice Douglas dissented in *Herb v. Pitcairn*. Their dissents clearly did not go to the rule as stated in the passages above quoted, but rather to its application to the particular facts of these cases, both of which presented difficulties absent, we believe, from the instant cases.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

THE IVANHOE IRRIGATION DISTRICT, et al., *Plaintiffs and Appellants,* vs. ALL PARTIES AND PERSONS, etc., *Defendants and Appellees.*	No. 993 122
THE MADERA IRRIGATION DISTRICT, et al., *Plaintiffs and Appellants,* vs. ALL PARTIES AND PERSONS, etc., *Defendants and Appellees.*	No. 994 123
THE MADERA IRRIGATION DISTRICT, et al., *Defendants and Appellants,* vs. PHILLIP and JANE E. ALBONICO, *Plaintiffs and Appellees.*	No. 995 124
THE SANTA BARBARA COUNTY WATER AGENCY, et al., *Plaintiffs and Appellants,* vs. ALL PARTIES AND PERSONS, etc., *Defendants and Appellees.*	No. 996 125

Motion to Dismiss Appeals and Supporting Brief

On Appeal from the Supreme Court of the State of California

HORTON AND KNOX,
Of Counsel.

GREEN, GREEN & BARTON,
Of Counsel.

BROBECK, PHLEGER & HARRISON,
Of Counsel.

HARRY W. HORTON,
REGINALD L. KNOX, JR.,
Suite 101, Law Building,
El Centro, California.

W. R. BAILEY,
60 Orinda Highway,
Orinda, California.

DENSLOW B. GREEN,
219 South D Street,
Madera, California.

SHERMAN ANDERSON,
523 West Sixth Street,
Los Angeles 14, California.

WM. P. BUTCHER,
1010 State Street,
Santa Barbara, California.

HERMAN PHLEGER,
ALVIN J. ROCKWELL,
111 Sutter Street,
San Francisco 4, California.

Attorneys for Appellees.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

THE IVANHOE IRRIGATION DISTRICT, et al., *Plaintiffs and Appellants,* vs. ALL PARTIES AND PERSONS, etc., *Defendants and Appellees.*	No. 993
THE MADERA IRRIGATION DISTRICT, et al., *Plaintiffs and Appellants,* vs. ALL PARTIES AND PERSONS, etc., *Defendants and Appellees.*	No. 994
THE MADERA IRRIGATION DISTRICT, et al., *Defendants and Appellants,* vs. PHILLIP and JANE E. ALBONICO, *Plaintiffs and Appellees.*	No. 995
THE SANTA BARBARA COUNTY WATER AGENCY, et al., *Plaintiffs and Appellants,* vs. ALL PARTIES AND PERSONS, etc., *Defendants and Appellees.*	No. 996

Motion to Dismiss Appeals and Supporting Brief

On Appeal from the Supreme Court of the State of California

MOTION

Appellees move to dismiss the appeals in the above four cases on the grounds, as to each case, that the judgment rests on an adequate non-federal basis and that the appeal does not present a substantial federal question.

BRIEF

The appeal in each case relies solely upon Section 1257(1) of the Judicial Code, which provides for review of a final judgment or decree of a state court by appeal "where is drawn in question the validity of a treaty or statute of the United States and the decision is against *its* validity." The expression "drawn in question", as the cases hereafter discussed establish, means brought forward and made the ground of decision. The Court from its foundation has adhered to the principle that it will not review judgments which rest on adequate state grounds or which (in the sense of Section 1257(1)) do not present a substantial federal question. The Court's present Rule 16. 1(b), pursuant to which the instant motion to dismiss is filed, gives full recognition to this principle.

The present appeals are from judgments involving the validity of certain contracts entered into between various California irrigation districts* and the Federal Government, acting by the Secretary of the Interior. Each contract provides that it is subject to confirmation by a court of competent jurisdiction. The United States is not here exerting any regulatory or coercive authority, such as taxing, or regulating interstate commerce; it has deliberately decided to proceed simply by means of contract, and with state-created agencies. Three of the cases were instituted, in state courts and under state statutes, for the purpose of obtaining confirmation of the contracts; the fourth, the *Alhonico* case, likewise brought in a state court and under a state statute, turned upon the validity of such a contract. The

*The term "irrigation district" or "irrigation districts", unless the context otherwise indicates, is used to include the Santa Barbara County Water Agency. For the purpose of this motion, separate attention need not be given certain subsidiary contracts between the Santa Barbara Water Agency and its so-called member units.

irrigation districts which were parties to the contracts (or purported contracts) were organized under, and were and are dependent for their powers wholly upon, state law. The United States did not appear or attempt to appear as a party in any of the cases. No lands of the United States are involved. Affirming (or affirming as modified) the trial court's judgments in three of the cases, and reversing in the fourth, the Supreme Court of California held in each case that the contract or contracts were invalid.

The basic determination of the court below was that the contracts in question were invalid when executed by a state agency. Consequently, the true issue was the right and power of a state agency to enter into contracts containing the terms and conditions of the instruments which were presented to the courts below for confirmation.

Prima facie, such confirmation proceedings, under state procedures, involving contracts to which state agencies are parties, do not present federal questions; on the contrary, they would appear to present a type of case peculiarly within the realm of state authority. We submit that decision in the instant cases was adequately rested on state statutory and decisional law and state constitutional provisions, including an important amendment to the California Constitution, approved in 1928, with respect to the use of state waters.

It is true here, as probably in all cases where the losing party strives for review in this Court by appeal from a state court, that the court below in the course of its opinions discussed federal statutory provisions. Such discussion, patently, does not give rise to an appealable federal question within the meaning of the Judicial Code or the decisions of this Court. Federal statutes were not brought forward and made the ground of decision; in every meaningful

sense, the court rested its decision upon an entirely adequate non-federal basis.

QUESTIONS PRESENTED

From the foregoing, it will be seen that the extensive "questions presented" set forth in the jurisdictional statement (pp. 6-11) are themselves question begging and of no value in deciding the present motion to dismiss. The questions for decision on this motion may be fairly stated, we believe, as follows:

> The Supreme Court of California held certain purported contracts entered into between state irrigation districts and the Federal Government, and which on their face were subject to confirmation in court proceedings, invalid because unauthorized by, and in conflict with, state statutory and constitutional and state decisional law. In the course of its opinions, the California Supreme Court discussed certain federal statutes and made comments concerning them. In the circumstances of these cases, was the validity of a statute of the United States thereby drawn in question within the meaning of Section 1257(1) of the Judicial Code, so that a substantial federal question is presented, or, to the contrary, do the judgments below rest on an adequate non-federal basis? Treating the appeal papers as petitions for writs of certiorari, are federal questions of substance presented sufficient to support the granting of the writs?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

California Constitution, Article XIV, Section 3:

"It is hereby declared that because of the conditions prevailing in this State the general welfare requires

that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; *provided, however*, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

California Constitution, Article I, Section 11:

"All laws of a general nature shall have a uniform operation."

California Constitution, Article I, Section 13:

"* * * No person shall be * * * deprived of * * * property without due process of law * * *"

California Water Code, Section 102:

"*Water State property: Acquisition of right to use water by appropriation.* All water within the State is

the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law."

California Water Code, Section 104:

"*Paramount interest of people in water: Determination as to conversion or control.* It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection."

California Water Code, Section 105:

"*Protection of public interest, and determination as to development.* It is hereby declared that the protection of the public interest in the development of the water resources of the State is of vital concern to the people of the State and that the State shall determine in what way the water of the State, both surface and underground, should be developed for the greatest public benefit."

California Water Code, Section 1052:

"*Unauthorized diversion or use a trespass: Institution of injunctive action.* The diversion or use of water subject to the provisions of this division other than as authorized in this division is a trespass, and the department may institute in the superior court in and for any county wherein such diversion or use is attempted appropriate action to have such trespass enjoined."

California Water Code, Section 22250:

"*Ratable apportionment of water among landowners.* All water distributed by districts for irrigation purposes shall except when otherwise provided in this article be apportioned ratably to each landowner upon the basis of the ratio which the last assessment against

his land for district purposes bears to the whole sum assessed in the district for district purposes."

California Water Code, Section 23,200:

"*Distribution and apportionment of water: Refusal of service to delinquent land.* All water, the right to the use of which is acquired by a district under any contract with the United States shall be distributed and apportioned by the district in accordance with the applicable acts of Congress, the rules and regulations of the Secretary of the Interior thereunder, and the provisions of the contract, and provision may be made in the contract for the refusal of water service to any or all land which may become delinquent in the payment of any assessment levied for the purpose of carrying out the contract."

STATEMENT OF THE CASES

For the purpose of this motion to dismiss, no elaborate statement of the cases appears necessary. We may accept, for this purpose, the summary set out in the jurisdictional statement (pp. 11-18) with the following qualifications.

The jurisdictional statement summarizes only isolated provisions of the contracts (jurisdictional statement, pp. 11-12, 14, 16-17). For a proper reading of the opinions of the visions of the contracts (jurisdictional statement, pp. 12, 14, 16-17). For a proper reading of the opinions of the Supreme Court of California, reference should be had to the full text of the contracts. (Ivanhoe: Clerk's Tr., Vol. 1, 15-51; Madera: Clerk's Tr., Vol. 1, 6-54; Santa Barbara: Clerk's Tr., Vol. 1, 73-113.)

Each contract provides that the contracting irrigation district shall

"file and prosecute to a final decree, including any appeal therefrom to the highest court of the State of California, in a court of competent jurisdiction a special proceeding for the judicial examination, approval, and

ber Co. v. Fisher, 2[illegible] U.S. 4[illegible], 450-453; *Minnesota v. National Tea Co.*, 309 U.S. 551, 554; and cases above cited. The mere fact that federal statutory or constitutional provisions are even passed upon and decided by the state court is immaterial for purposes of appeal if the decision finds adequate support in state law.

Thus, in the *Fox Film* case, cited above, the Court held:

> "The case, in effect, was disposed of before the federal question said to be involved was reached. *Chouteau v. Gibson*, 111 U.S. 200; *Chapman v. Goodnow*, 123 U.S. 540, 548. A decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear. 296 U.S. at p. 211.

When an adequate state ground is present, review may not be had in this Court even though the court below "summoned to its support an erroneous view of federal law." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. at p. 129.

The application of the rule to the instant cases requires dismissal of the present appeals, as is manifest from an analysis of the decision of the Supreme Court of California. To this we now turn.

The jurisdictional statement (p. 2) correctly notes that the questions involved in these appeals are "closely related". The court below wrote its principal opinion in the *Ivanhoe* case (app., 1-64). Its much shorter opinions in the other three cases referred to the *Ivanhoe* opinion for a fuller statement of the controlling grounds of decision (app., 139, 183, 221). For purposes of this motion to dismiss, main attention may be given to the *Ivanhoe* decision.

The Ivanhoe Irrigation District, which is involved in the case of that name, and the Madera Irrigation District, which is involved in both the *Madera* and *Albonico* cases, were organized and exist under the California Irrigation District

Law.* The Santa Barbara County Water Agency, involved in the fourth case, was organized and exists under a California statute of 1945, as amended, known as the Santa Barbara County Water Agency Act.‡ That Agency's so-called member units are also districts or political subdivisions of the state, organized and existing under state law.† The powers, obligations and responsibilties of such districts and agencies are controlled at every point by state law. Irrigation districts are authorized to contract with the Federal Government, in accordance with California law, namely, the California Irrigation District Federal Cooperation Law.‡ Similarly the Santa Barbara County Water Agency Act, as amended, Section 6, authorizes, *inter alia*, contracts in accordance with the California Irrigation District Federal Cooperation Law.

One section of the Irrigation District Federal Cooperation Law, in turn, was considered by the court below to be of particular pertinence. It provides that water carried to an irrigation district under a contract with the United States shall be distributed and apportioned by the district "in accordance with the *applicable* acts of Congress, the rules and regulations of the Secretary of the Interior thereunder", etc. Water Code, Section 23200. (Emphasis ours.)

Reviewing the opinion in the *Ivanhoe* case, it will be seen the court notes at the outset that what is here involved is a *contract*, subject to *confirmation* in the instant proceed-

*California Water Code, Secs. 20500-29978.

‡Calif. Stats. 1945, Ch. 1501, p. 2780, as amended by Calif. Stats. 1949, Ch. 12, p. 18, 1 Deering's Calif. Water Code Ann., Act 7303 (1954).

†The Santa Barbara County Water Agency Act, as amended, cited in preceding footnote, Sec. 2(f) and (g).

‡California Water Code, Division 11, Part 6, Ch. 2, Secs. 23175, *et seq.*

ing. Although various matters must be considered as "necessarily incident thereto", the "judgment is limited to a determination of the validity of the contract" (app., 2-3).* The opinion throughout repeatedly and correctly sounds the note that the essential issue, to which all else is subordinate, is whether a consensual undertaking by a public agency of the state should be confirmed in a statutory proceeding established by state law. The court points out, citing the California Water Code, Section 22680, that "if the contract fails of confirmation on one material ground it must fail of confirmation as a whole" (app., 11).

Many pages of the opinion are devoted to the historical development of California law as to the use of water for irrigation purposes, with references to federal law by way of historical background (app., 13-21, 23-33). Emphasis is placed upon Section 3, Article XIV, of the California Constitution, as amended in 1928, which declares the policy of the state to be that its water resources shall be put to beneficial use to the fullest extent to which they are capable (app., 25-27). Stress is also laid upon Section 22250 of the State Water Code, which requires that water distributed by irrigation districts shall be apportioned ratably to each landowner upon the basis of the assessment made against him, without discrimination (app., 46-47). Several other sections of the State Water Code—i.e., Sections 102, 104, 105 and 1952—are cited and quoted for the proposition that, under state law, domestic waters for irrigation shall be put to their highest beneficial use and that water users, present and potential, have both vested and inchoate rights to secure the use of state waters on an equal and non-discriminatory basis (app., 27-29).

*The opinions are reported beginning at 47 A.C. 603, but for convenience the page references will be to the appendices to the jurisdictional statement.

It is concluded that "the title to the unappropriated domestic waters of the state is in the State of California in trust for the use and benefit of the beneficiaries of that trust" and that "the trust character of that title is anchored in the state by constitutional provisions, by statutes enacted in furtherance thereof, and by the decisional law of the state" (app., 32). In this connection, the court observed there was no dispute between any of the parties appearing in the litigation as to the nature of that title (app., 12, 21-22).

The decision plainly turns upon state law, including Section 23200 of the State Water Code, read in the light of Section 3 of Article XIV of the California Constitution and Section 22250 and other provisions of the Water Code relating to the appropriation, distribution and use of water by districts and the powers and obligations of irrigation districts. Section 23200, referred to above, permits districts to contract with the United States for a water supply and to distribute and apportion the water in accordance with the "applicable" acts of Congress. The court below discusses the Federal Reclamation Act of 1902 (app., 33-36) and expresses doubt that certain of its provisions were intended to extend to privately owned lands (app., 40-51). The court did not base decision, however, upon an interpretation of the federal act, but squarely held that if the federal act should be construed to apply to privately owned lands,

> "such a construction would obviously remove it from consideration as an 'applicable' law governing the execution of the contract in question. *Since its attempted application to the contract is unauthorized under the laws of this state it is necessarily not an 'applicable' law.*" (App., 50.) (Emphasis ours.)

A few lines later the court holds, referring to the section of the State Water Code in question:

"Section 23200 contemplates that *applicable* federal law shall apply." (App., 51.) (Emphasis the court's.)

Later, in considering other provisions of the contract the court refers to the controlling force of "the applicable water law of this state." (App., 56.)*

The opinion at several points refers to the constitutional protection afforded state water users against denial of due process and invasion of their right to equal and non-discriminatory treatment. (App., 27, 29-30, 32, 47, 48-49, 56, 59.) This protection stems from California water law, including Section 3 of Article XIV of the State Constitution, dealing with the use of state waters, and the relevant provisions of the State Water Code.

The reliance placed by the court upon due process and equality of treatment was clearly grounded upon the proposition that the state law governing irrigation districts, if improperly construed to authorize the instant contracts, would collide with Article I, Sections 11 (uniformity of treatment) and 13 (due process) of the California Constitution, as the record references cited in the next-preceding paragraph demonstrate. (See particularly app., 29-31, 47.) The court did not cite any federal cases, in this relation, and *City of Pasadena v. Stimson*, 91 Cal. 238, from which the

*Appellants suggest the proposition that where a state statute incorporates federal law, its interpretation itself becomes a federal question (jurisdictional statement, p. 36). Were this rule applicable, a starting point for discussion would be *Miller's Executors v. Swann*, 150 U.S. 132, 136-137, where the Court held: "The fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State, does not make the determination of such rights a Federal question." To the same effect is *Louis & Nash R. R. v. West. Un. Tel. Co.*, 237 U.S. 300, 303. *Cf. Flournoy v. Wiener*, 321 U.S. 253, 260. However, the Court in the instant cases is not confronted with this so-called incorporation problem. The very question before the Supreme Court of California was what federal statutes the state law made applicable. This was, first and last, a state question.

court quoted on the equal protection point (app., 47), does not cite any federal cases.

There are only two references anywhere in the opinion to the Federal Constitution. The first appears during the course of a discussion of riparian rights, not here in issue, simply in the phrase "protected from unlawful encroachment by both state and federal Constitutions." (App., 27.) And the second, which is likewise preceded by a reference to the State Constitution, appears in a quoted passage from *Merchants Nat. Bank v. Escondido Irr. Dist.*, 144 Cal. 329, referring to "the protection of the provision of section 13 of article I of the state Constitution * * * that 'no person shall be * * * deprived of * * * property without due process of law,' and of the similar provision of Section 1 of the fourteenth Amendment to the constitution of the United States." (App., 29-30.)*

Finally, in concluding this phase of the discussion, reference should be had to the disposition made by the court below of the contention that the validity of the contracts under California law was established, in some fashion, by the Second Validating Act of 1949, enacted by the California Legislature. After showing that this Act did not, and was not intended to, validate the instant contracts, the court continued (app., 58-59):

> "Furthermore if the contract be deemed to include a utility type contract at the option of the United States, the Second Validating Act of 1949, or any validating act of the character of the one here relied upon by the attorney general, could not render such a contract valid. It is well settled that the Legis-

*Where the state court of highest resort is ambiguous in its treatment of both federal and non-federal questions, and the state ground is adequate to support the judgment, this Court presumes that the decision below was based upon the non-federal ground. *Lynch v. New York*, 293 U.S. 52, 54-55; *New York v. Central Savings Bank*, 306 U.S. 661. Although available, this rule need not be invoked in the present instance because no such ambiguity exists.

lature may ratify only what it could have theretofore authorized. It is obvious that the Legislature could not by a general ratifying statute breathe validity into a contract the effect of which would be to avoid *all of the laws of the state, both constitutional and statutory,* respecting the regulation and control of public utilities in this state. * * * In addition any validating act could not have confirmed the 160-acre limitation for the obvious reason that the Legislature could not have theretofore constitutionally authorized it." (Emphasis ours.)

Clearly, the decision below did not turn on the interpretation or validity of any federal statute, or upon the validity of any state statute under the Federal Constitution.

The simple fact, which appellants seemingly do their utmost to avoid, is that the Federal Government is here proceeding by means of contract—that is, consensual undertakings—with state districts and agencies. And, fully recognizing that the contract will not be effective unless the other contracting party has the requisite capacity and authority under state law, the Federal Government itself has conditioned the contract upon confirmation proceedings. Wholly consistent with this understanding, the Government elected not to respond as a party in any of the four cases. Its attitude seems to have been: Whether, on their side, the state districts or agencies have the requisite authority to enter into these contracts is a matter of state law, for the state courts to decide.

It appears contrary to the essential character of these proceedings and the subject matter of the contracts for appellants now to contend that the state courts do not have the final say, after all; but that the past litigation of seven and a half years is but prologue to complete review in this Court of the decision of the California Supreme Court as to California law.

II. Appellants' Efforts to Compound a Substantial Federal Question Are Baseless.

The foregoing discussion presents our affirmative case for the granting of the motion to dismiss. We now briefly consider two matters which it may be anticipated appellants will further argue in any reply.

Repayment and related features of the contracts. The court below discussed the debtor-creditor relationship contemplated by the contracts, questions as to the title to the works, the permanency of water rights and the ascertainment of the total amount for which the irrigation districts were liable. (App., 38-40, 52-56.) Appellants have presented these as substantial federal questions upon which decision was assertedly based. Jurisdictional statement, pp. 9-10, 22-24.

Although in this connection the court properly referred to federal statutes, it does not follow, on the authorities above and hereafter discussed, that this raised any federal question. The court, of necessity, was looking at the matter from the standpoint, not of federal right, but of irrigation district responsibility, fiscal and otherwise, under California law.

Another persuasive consideration, moreover, is noted by the court in a footnote to its opinion. (App., 39, fn. 3.) Public Law 643, 84th Cong., 2d Sess., approved July 2, 1956, 70 Stat. 483-484, which was enacted long after the instant contracts had been signed, and while the cases were pending before the court below, was obviously designed to correct some of the uncertainties—and inequities—now under discussion. See the Senate Report on the Bill, Senate Report No. 2241, 84th Cong., 2d Sess. The Act requires the Secretary of the Interior, "if the other contracting party so requests," to include repayment and other provisions in the contracts quite different from those in the contracts before

the court below and this Court. Section 2 of the Act gives the Secretary authority "to negotiate amendments to existing contracts * * * to conform said contracts to the provisions of the Act."

The irrigation districts now before the Court have not had an opportunity to avail themselves of the renegotiation procedure. Were the present contracts to be renegotiated under this Act, it is evident that they would be instruments quite different from those now before the Court. The validity of the instant contracts must obviously be judged on their present terms. The enactment of the Act of July 2, 1956 demonstrates, however, that the present out-moded provisions do not present a continuing problem, and hence a substantial question warranting review by the Court.

It is agreeable to add that Section 4 of the Act of July 2, 1956, incorporates the familiar Section 8 of the Reclamation Act of 1902, admonishing respect for state water law. This section is discussed *infra*, pp. 19-20.

The "ownership" of California waters. The court below, as we have noted, discussed the nature of the title to state waters available for irrigation. Referring to rights acquired by the United States for the use and benefit of the Central Valley Project (app., 19-21), the court stated that "when an outside party, such as the United States, by contract, legislation or otherwise, steps into the shoes of the state to administer that trust by the development, conservation and distribution of the trust res, it is bound by the same rules of law as surround and govern the State of California or any other purveyor of water of the state for the benefit of its water users" (app., 31). We emphatically believe this is a correct statement of the controlling law, both state and federal, but we deny that it raises any substantial federal question in the context of the instant cases.

To begin with, this statement raises no substantial federal question because it is palpably correct. Section 8 of the Reclamation Act of 1902, 32 Stat. 390, as amended, now codified as 43 U.S.C. 372, 383, has provided for many years as follows:

> "That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

The application of this section to the Central Valley Project was recently before the Court in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725. With reference to this section, the Court with "unclouded explicitness"* held:

> "By its command that the provisions of the reclamation law should govern the construction, operation, and maintenance of the several construction projects, Congress directed the Secretary of the Interior to proceed in conformity with state laws, giving full recognition to every right vested under those laws * * *. The governing water law of California must now be derived from a 1928 Amendment to its Constitution [Article

*We borrow this phrase from the Court's opinion in a different although related context. *Bank of America v. Parnell*, 352 U.S. 29, 33.

XIV, Section 3] * * * California's basic water law, to which the Federal Reclamation Act defers." 339 U.S. at pp. 734, 743, 751.

Nor was this a novel statement or application of the controlling law. To the same effect were the prior holdings in *Nebraska v. Wyoming*, 295 U.S. 40, 43; *Ickes v. Fox*, 300 U.S. 82, 94-95; *Nebraska v. Wyoming*, 325 U.S. 589, 614-616.

Section 8 of the Reclamation Act, carefully preserving the integrity of state water law, was reaffirmed in the congressional action of July 2, 1956, discussed above, pp. 17-18. The Court should also note the Act of July 10, 1952, which deals with any suit for the adjudication or administration of rights to the use of water when the United States is the owner of or is in the process of acquiring such rights by appropriation under state law, by purchase, by exchange, or otherwise. Where the United States is a necessary party to any such suit, the Act gives consent to its joinder. When so joined, the United States "shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction. * * *" 66 Stat. 560, 43 U.S.C. 666.

Secondly, no one appearing in this litigation has at any time denied that Section 8 of the Reclamation Act has at all times applied with full vigor to the Central Valley Project. This may account in part for the court's statements that there is no disagreement as to the nature of the title to state waters. (App., 12, 21-22.) The court rightly thought that the applicability of Section 8 presented no question—federal or substantial—and it was clearly correct in this assumption insofar as the instant litigation is concerned.

In this connection, the court early in its opinion (app., 8) correctly summarized a pertinent portion of the State's amended answer in the *Ivanhoe* case as follows, referring to certain applications for the appropriation of waters filed by the state and their subsequent assignment to the United States for the use and benefit of the Central Valley Project:

> "Paragraph VIII of the state's amended answer alleges that by virtue of the terms of the applications, the state has become and is the trustor of an express trust; that by the assignments the United States has become and is the trustee of that trust; that the landowners to be served from the works of the Central Valley Project, including the landowners of plaintiff district, have become and are the beneficiaries of that trust; that any and all claims or interests of the United States obtained by the proposed contract are held by the United States as such trustee as a part of a trust corpus or res for the use and benefit of the Central Valley Project and the landowners to be served water from the works of that project, and in particular the landowners of plaintiff District, that the State of California is entitled to be heard, among other things, as to all matters relating to the administration and execution of the trust by the United States and is entitled to require that the trustee administer the trust according to its true intent and meaning."

Paragraph VIII of the State's amended answer in the *Ivanhoe* case is to be found at pages 161-162, volume 1 of the clerk's transcript.

The short answer to the question of the "ownership" of the waters, however, is that the instant cases, in which the United States did not even appear as a party, do not directly put into issue the character of the Government's title to the waters in the sense of raising a substantial federal question.

If we were to assume that the determination of the court below relative to the ownership of the water otherwise constituted a substantial federal question, it is clear that the judgments of the California Supreme Court rest at least in part on a non-federal ground adequate to support them.

If this Court were to assume jurisdiction of these cases and determine that the California Supreme Court was in error regarding the ownership of the waters within the boundaries of that state, and even that the United States is the absolute owner in fee of the waters within the Central Valley Project and can condition or limit their use as it sees fit, still the judgments of the court below would stand and the contracts would of necessity be declared invalid.

The Supreme Court of the State of California, as we have seen, has determined that the provisions of the contracts are violative of California law, both statutory and constitutional, and that an irrigation district, being an agency of the state, cannot enter into a contract with the United States which contains such provisions.

We emphasize at the outset that in the instant litigation the Government is simply attempting to proceed by contract with public agencies which are creatures of the State of California. No regulatory or coercive power of the Federal Government is brought into play. A valid contract necessarily requires two contracting parties with capacity to make it. The highest court of the state has held that one of the parties, namely the state agency, lacks such power and, under the California Constitution, could not be granted such power by the Legislature. This is the fundamental point to which all argument eventually returns. No action of this Court, we submit, can provide California irrigation districts with powers which they lack. An opinion of this Court, in the words of *Flournoy v. Wiener*, 321 U. S. 253, 261-262,

would therefore "be advisory only, since there is nothing before" the Court on which it can "render a decision which would have any controlling effect on the rights of the parties."

III. Regarding the Appeal Papers as Petitions for Writs of Certiorari, the Writs Should Be Denied.

Section 2103 of the Judicial Code provides that when an appeal is improvidently taken from a state court and the proper mode of review is by way of certiorari, the appeal papers shall be regarded and acted on as a petition for the writ.

The burden of our argument in support of the motion to dismiss the appeals has been that the decision below rests on an adequate non-federal ground and that no substantial federal question is presented. In this regard, the test for certiorari, under Section 1257(3) of the Judicial Code, is the same as under Section 1257(1) and (2), relating to appeals. The cases cited under Points I and II, above, deal with both appeals and petitions for certiorari. No "federal question of substance" is presented within the sense of Rule 19, 1(a) of the Rules of this Court.

If, therefore, as we have endeavored to establish, the appeals should be dismissed, so likewise in these circumstances writs of certiorari should be denied.

CONCLUSION

The judgment below, as to each case, rests on an adequate non-federal basis; no substantial federal question is presented. The appeals should be dismissed, and writs of certiorari denied.

Respectfully submitted,

HORTON AND KNOX,
Of Counsel.

HARRY W. HORTON,
REGINALD L. KNOX, JR.

W. R. BAILEY.

GREEN, GREEN & BARTOW,
Of Counsel.

DENSLOW B. GREEN.

SHERMAN ANDERSON.

WM. P. BUTCHER.

BROBECK, PHLEGER & HARRISON,
Of Counsel.

HERMAN PHLEGER,
ALVIN J ROCKWELL,
*Attorneys for Appellees**

June, 1957.

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*Solely for the purpose of this motion to dismiss, attorneys representing separate interests in the courts below have joined together in behalf of all appellees.